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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

19 | KIANA JONES,

Case No. 5:24-cv-00206-KK-DTB

Petitioner.

vs.

STARZ ENTERTAINMENT, LLC.

Respondent.

**STARZ ENTERTAINMENT, LLC'S
MOTION TO DISMISS PETITION
TO COMPEL ARBITRATION**

Hearing: Courtroom 3
Date: March 14, 2024
Time: 9:30 am
Judge: Hon. Kenly Kiya Kato

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE THAT on March 14, 2024 at 9:30 a.m., or as
4 soon thereafter as the matter may be heard, in the United States District Court,
5 Central District of California, Eastern Division, located at George E. Brown, Jr.
6 Federal Building and United States Courthouse, 3470 12th St., Riverside, CA
7 92501, Courtroom 4, 3rd Floor, before the Honorable Kenly Kiya Kato,
8 Respondent STARZ Entertainment, LLC will move, and hereby presents for
9 hearing by the Court, this motion to dismiss Petitioner Kiana Jones's Petition to
10 Compel Arbitration (Dkt. 1) for the reasons set forth below.

11 This motion is based on this notice of motion and motion, the
12 accompanying memorandum of points and authorities and exhibits, any reply
13 memorandum, and such additional papers and arguments as may be presented at
14 or in connection with the hearing.

15 This motion is made following a conference of counsel under Central
16 District Local Rule 7-3, which took place on Tuesday, February 6, 2024.

By: /s/ JEFFREY E. TSAI

JEFFREY E. TSAI

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1 Respondent STARZ Entertainment LLC (“STARZ”) moves to dismiss
 2 Petitioner Kiana Jones’s (“Petitioner” or “Jones”) Petition to Compel Arbitration in
 3 its entirety.

4 **I. INTRODUCTION**

5 The parties in this matter are already engaged in a pending arbitration
 6 proceeding with JAMS, as required by the dispute resolution provision in
 7 STARZ’s Terms of Use (“STARZ TOU”). And STARZ is, and has been,
 8 participating earnestly in that proceeding. But counsel for the Petitioner—Keller
 9 Postman LLC (“Keller”—is dissatisfied with JAMS’s administrative decisions
 10 for the tens of thousands of individuals Keller purports to represent. And so
 11 Keller, on behalf of one of those claimants (Petitioner Kiana Jones), has sought
 12 improper relief from this federal court to overrule JAMS and dictate different
 13 terms for the pending arbitration. Keller’s action, whether on behalf of one or
 14 thousands of claimants, is not appropriate—and this Court should dismiss it so
 15 that the parties can resume with arbitration.

16 Of the numerous claimants that Keller alleges it represents, the firm
 17 formally initiated arbitration in June 2023 for 7,300 of them concurrently,
 18 including Petitioner. In initiating its thousands of claims, Keller demanded that
 19 each claimant receive a separate, individual arbitration proceeding—but JAMS
 20 did not agree. After considering briefing from the parties, JAMS determined in
 21 August 2023 under its Comprehensive Arbitration Rules and Procedures (“JAMS
 22 Rules”) that the 7,300 claims should proceed as a ***consolidated arbitration*** before
 23 a ***single arbitrator***—and, in doing so, rejected Keller’s demand.

24 Unhappy with JAMS’s decision, Keller proceeded to spend the next six
 25 months unsuccessfully attempting to undermine and obstruct the JAMS arbitration
 26 proceeding from moving forward. Keller’s lawsuit before this Court is the
 27 culmination of its efforts. However styled, Keller’s “Petition to Compel
 28 Arbitration” is not in reality seeking to compel arbitration. Indeed, the parties are

1 already in arbitration and have been since July 2023. Instead, Keller's ultimate
 2 goal is purely one of litigation strategy—to seek this Court's help in overruling
 3 JAMS's arbitration decisions in order to try to make it too expensive for STARZ
 4 to defend itself on the merits at arbitration and force an early settlement payday.
 5 But unfortunately for Keller, JAMS has thoroughly reviewed the STARZ TOU
 6 and its own JAMS Rules and flatly rejected the firm's tactical play. And that is
 7 why Keller has now cynically turned to this Court for leverage.

8 The Court should dismiss the Petition for the following reasons.

9 First, Petitioner and STARZ are already engaged in arbitration. A party may
 10 only invoke Section 4 of the Federal Arbitration Act to compel arbitration where
 11 the other party has refused to arbitrate. That has not happened here.

12 Second, Petitioner asks the Court to overrule—improperly—decisions that
 13 the contract between Petitioner and STARZ (the STARZ TOU dated December
 14 12, 2019) specifically delegated to JAMS. Each and every one of the decisions
 15 about which Petitioner (via Keller) now complains is something the parties'
 16 binding arbitration provision assigned to JAMS—whether it is the decision to
 17 consolidate arbitration demands, the ruling that arbitrator disqualification applies
 18 to the entire proceeding, or the determination that mediation procedure and fee
 19 disputes have been delegated to the arbitrator. Well-settled precedent requires the
 20 Court to honor and enforce the parties' delegation of these issues to JAMS.

21 Third, even if the questions that Keller and Petitioner now raise were not
 22 delegated to JAMS by the STARZ TOU, the Petition still impermissibly asks the
 23 Court to decide procedural questions that courts have repeatedly held are
 24 presumptively for arbitrators, not courts, to decide.

25 Fourth, the STARZ TOU do not require separate, individual arbitrations as
 26 Keller and Petitioner contend. Indeed, the words "individual arbitration" do not
 27 appear anywhere in the STARZ TOU. While the STARZ TOU prohibit class and
 28 other *representative* arbitrations, they permit *consolidated* arbitrations in which

1 every party continues to pursue its own claims on its own behalf.

2 Fifth, to the extent the California Arbitration Act applies at all (and it does
 3 not), consolidation does not in any way conflict with the separate right to
 4 disqualify an arbitrator under California Civil Procedure Code section
 5 1281.91(b)(1). In fact, Petitioner's argument, if accepted, would nullify
 6 completely a California statute which *expressly permits* consolidated arbitrations.
 7 And Petitioner's attempt to transform that limited right to disqualify into an
 8 "absolute and unwaivable right to *choose her own arbitrator*" (Pet. ¶ 48) lacks any
 9 basis in law.

10 And, sixth, Petitioner's argument that the mediation fee dispute should be
 11 decided by the Court is precluded by judicial estoppel because Petitioner took the
 12 opposite position before JAMS and won.

13 **II. STATEMENT OF FACTS**

14 **A. Keller Submits Thousands of Arbitration Demands**

15 In January 2023, Keller submitted to JAMS, on behalf of tens of thousands
 16 of individual claimants (including Petitioner), identical demands for arbitration
 17 against STARZ. *See* Pet., ¶ 6; *id.*, Ex. L at 1 (June 7, 2023 Letter from S. Eisner to
 18 Counsel); Pet., Ex. J, Ex. 4 at 2 (Aug. 8, 2023 Letter from S. Eisner to Parties).¹
 19 Those demands all identically allege violations of the Video Privacy Protection
 20 Act ("VPPA") (18 U.S.C. § 2710) and its state law analogues. *See* Pet., Ex. B at 5,
 21 11–13 (Jones Arbitration Demand). The demands assert that STARZ violated
 22 those statutes by deploying on its website a software tool called the "Meta Pixel."
 23 *Id.* at 7–10. They allege that STARZ uses the Meta Pixel to send to Facebook
 24 information that can be used to identify the video content claimants watched. *Id.* at
 25 7–10. STARZ disputes these allegations.

26
 27 ¹ The exhibits to the Petition are confidential arbitration submissions;
 28 although we cite portions of them herein, they also contain information that is not
 required for this proceeding.

1 Each arbitration demand concedes that the claimant agreed to and is bound
 2 by the same version of the STARZ TOU. *See* Pet., ¶ 3. And the STARZ TOU
 3 require arbitration with JAMS. *See* Pet., Ex. A at ¶ 27 (STARZ TOU). The
 4 STARZ TOU also require that “[t]he parties will endeavor first to attempt to
 5 resolve the controversy or claim through mediation administered by JAMS before
 6 commencing any arbitration.” *Id.* Petitioner does not dispute that she assented to
 7 and is bound by the STARZ TOU. *See* Pet., ¶ 3. And significantly, she does not
 8 challenge the STARZ TOU as unconscionable. *Id.*

9 The arbitration provision, in relevant part, provides as follows:

10 GOVERNING LAW; ARBITRATION. These Terms of Use
 11 will be governed by and construed in accordance with the laws
 12 of the State of California. *All controversies, disputes or claims*
 13 *arising out of or relating to these Terms of Use will be*
 14 *determined pursuant to the mediation and arbitration*
 15 *procedures of JAMS, and administered by JAMS or its*
 16 *successor (“JAMS”) in accordance with the comprehensive*
 17 *rules and procedures, including the optional appeal*
 18 *procedure, of JAMS (“JAMS Rules”), as modified by these*
 19 *Terms of Use. The parties will endeavor first to attempt to*
 20 *resolve the controversy or claim through mediation*
 21 *administered by JAMS before commencing any arbitration.*

22 . . .

23 *You and Starz agree that each may bring claims against the*
 24 *other only in your or its individual capacity, and not as a*
 25 *plaintiff or class member in any purported class or*
 26 *representative proceeding.*

27 Pet., Ex. A at ¶ 27 (STARZ TOU) (emphases added).

28 After submitting a multitude of identical arbitration demands against
 29 STARZ, Keller “requested stays while the parties pursued mediation.” Pet., Ex. L
 30 at 1 (June 7, 2023 Letter from S. Eisner to Counsel).

27 **B. The Parties Reach an Impasse on Pre-Arbitration Mediation**

28 To date, the required pre-arbitration mediation has not yet occurred as to

1 Petitioner or any other claimant. *See* Pet., ¶¶ 7, 10; Pet., Ex. F, Ex. 6 at 1 (June 14,
 2 2023 Email from A. Pak to S. Nevins). That is because STARZ and Keller were
 3 unable to reach agreement on how the mediation should be conducted (on a
 4 consolidated basis versus individually) and how mediation fees should be split
 5 (50/50 versus STARZ paying essentially all fees). *See* Pet., Ex. F, Ex. 4 at 1–2, 5
 6 (May 31–June 1, 2023 Correspondence Between S. Duddy, D. Horniak, and S.
 7 Nevins); Pet., Ex. F, Ex. 6 at 1 (June 14, 2023 Email from A. Pak to S. Nevins).

8 The parties’ impasse was not due to any refusal by STARZ to mediate.
 9 STARZ has been willing—and remains willing—to participate in a single,
 10 consolidated mediation with any claimants who participate in the consolidated
 11 arbitration (thereby, effectively obviating the issue of a mediation fee split). *See*
 12 Pet., Ex. J, Ex 3 at 3 n.3 (July 31, 2023 STARZ Letter Brief to K. Loew)
 13 (“STARZ has always been open to a consolidated mediation proceeding *provided*
 14 *that* Keller agrees to a similarly consolidated arbitration proceeding”) (emphasis
 15 in original). STARZ has also maintained that, in the alternative, it would
 16 participate in individual pre-arbitration mediations where the parties split the
 17 mediation fees 50/50. *See* Pet., Ex. F, Ex. 4 at 1 (June 1, 2023 Email from D.
 18 Horniak to S. Nevins). What STARZ has objected to is (1) participating in a
 19 single, consolidated mediation followed by thousands of *individual* arbitrations,
 20 and (2) Keller’s attempt to saddle STARZ with the vast majority of the fees for
 21 7,300 individual mediations.

22 On May 31, 2023, Keller requested that JAMS initiate individual
 23 mediations on behalf of 7,300 claimants. *See* Pet., Ex. F, Ex. 3 at 1 (May 31, 2023
 24 Email from S. Duddy to S. Nevins). Keller further requested that JAMS order
 25 STARZ to pay all mediation fees in excess of \$250 and “unilaterally appoint, for
 26 each Claimant, a mediator.” *Id.* STARZ opposed that request on the grounds that
 27 (1) the parties should split mediation fees 50/50, as is customary in mediation
 28 practice, and (2) the parties should first attempt to work together to identify

1 mutually acceptable mediators and a cost-effective mediation procedure. *See* Pet.,
 2 Ex. F, Ex. 4 at 1–2 (June 1, 2023 Email from D. Horniak to S. Nevins).

3 On June 7, 2023, JAMS rejected Keller’s request to initiate 7,300 JAMS-
 4 administered individual mediations, stating that (1) “[m]ediation and arbitration
 5 represent distinct ADR processes,” (2) “the dispute resolution clause requires
 6 mediation before arbitration,” and (3) “[a]s such, the arbitration demands will
 7 remain on hold while the parties proceed with the mediation process.” Pet., Ex. L
 8 at 1 (June 7, 2023 Letter from S. Eisner to Counsel).

9 **C. Keller Seeks to Initiate 7,300 Arbitrations**

10 Having failed to persuade JAMS to rule on how mediations should be
 11 conducted, Keller next sought to initiate 7,300 individual *arbitrations*—before
 12 any mediations had occurred—so that the arbitrator could resolve disputes over
 13 mediation procedure. Pet., Ex. F, Ex. 6 at 1 (June 14, 2023 Email from A. Pak to
 14 S. Nevins). On June 14, 2023, Keller notified JAMS that its claimants would “not
 15 participate in any mediation that requires them to pay half of the mediation fees
 16 and instead invoke their rights to arbitrate that dispute.” *Id.* Taking the position
 17 that, “[u]nder the JAMS rules designated in the arbitration agreement, [the
 18 mediation fee] dispute is for a JAMS arbitrator to resolve,” Keller demanded that
 19 JAMS “issue invoices to the parties to initiate the arbitration process over the
 20 parties’ disputes, including over the interpretation of [the] agreement under which
 21 [claimants] seek arbitration.” *Id.*

22 Through this demand, Keller sought to impose JAMS’s \$1,750 arbitration
 23 initiation fee on STARZ for each of Keller’s 7,300 claimants. *See* Pet., Ex. D at 1
 24 (JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses); Pet.,
 25 Ex. C at 3–21 (JAMS General Fee Schedules). If JAMS initiated each of those
 26 7,300 arbitrations separately, STARZ would have been invoiced for \$12,775,000
 27 in arbitration initiation fees *alone*—despite the fact that *none* of these claimants
 28 had engaged with STARZ in a pre-arbitration mediation as mandated by the

1 STARZ TOU. *Id.*; Pet., Ex. F, Ex. 6 at 1 (June 14, 2023 Email from A. Pak to S.
 2 Nevins).

3 On July 6, 2023, JAMS granted Keller’s request over STARZ’s objection.
 4 *See* Pet., ¶ 11; Pet., Ex. F, Ex. 7 at 1 (July 6, 2023 Letter from K. Loew to Parties).
 5 JAMS stated that it “will proceed with administration” of claimants’ claims. Pet.,
 6 Ex. F, Ex. 7 at 1 (July 6, 2023 Letter from K. Loew to Parties). JAMS further
 7 requested that the parties submit simultaneous briefing to the JAMS National
 8 Arbitration Committee (“NAC”)² on whether the arbitrations should be
 9 consolidated under JAMS Rule 6(e). *Id.*

10 Over the next four weeks, the parties submitted their respective positions on
 11 consolidation. *See* Pet., ¶¶ 12–13; Pet., Ex. F (STARZ Opening Brief); Pet., Ex. G
 12 (Keller Opposition Brief); Pet., Ex. J, Ex. 3 (STARZ Reply Brief).

13 **D. JAMS Consolidates the Demands for Arbitration**

14 On August 8, 2023, after “receiv[ing] and review[ing] the parties’ positions
 15 on the issue of consolidation,” the NAC determined that the 7,300 demands for
 16 arbitration should be consolidated. *See* Pet., ¶ 14; Pet., Ex. J, Ex. 4 at 1–3 (August
 17 8, 2023 Letter from S. Eisner to Parties). The NAC determined that the STARZ
 18 TOU “do not prohibit the consolidation of multiple filings,” that “California law
 19 on arbitrator selection and disqualification does not preclude the consolidation of
 20 these Demands,” and that “consolidation would enable fair, efficient, and timely
 21 adjudication of these disputes.” Pet., Ex. J, Ex. 4 at 2–3. As a result, JAMS

24 ² JAMS Rule 1 states that “[t]he authority and duties of JAMS as prescribed
 25 in the Agreement of the Parties and in these Rules shall be carried out by the
 26 [NAC] or the office of JAMS General Counsel or their designees.” Pet., Ex. E at
 27 4. The NAC is “a body independent of the arbitrator” that “decides issues of
 28 controversy that may arise when the arbitrator is unavailable, has not yet been
 appointed, or the issue involves the arbitrator, such as claims of conflict.” *See*
www.jamsadr.com/arbitration?tab=overview. It “acts as a safeguard to the fairness
 of the arbitration process.” *Id.*

1 invoiced STARZ for a single, consolidated arbitration initiation fee of \$1,750.

2 **E. Keller Repeatedly Attempts to Undermine Arbitration**

3 Following JAMS’s ruling on consolidation, which appears to have
 4 undermined Keller’s hoped-for arbitration initiation-fee settlement leverage, Keller
 5 has consistently tried to derail and delay a “fair, efficient, and timely adjudication of
 6 these disputes.” Pet., Ex. J, Ex. 4 at 3 (Aug. 8, 2023 Letter from S. Eisner to
 7 Parties); *see generally* Pet., Ex. J, Ex. 5 at 4 (Sept. 27, 2023 Email from P. Huber to
 8 S. Nevins); Pet., Ex. J, Ex. 8 at 1 (Nov. 30, 2023 Email from P. Huber to S.
 9 Nevins); Pet., Ex. J, Ex. 10 at 1 (Dec. 15, 2023 Letter from P. Huber to S. Nevins).

10 First, on September 27, 2023, when JAMS requested the parties’ positions
 11 on where the consolidation arbitration hearing should be conducted, Keller argued
 12 that each claimant required a “hometown arbitration”—that is, to the extent each
 13 claimant did not receive a hearing in his or her hometown, the arbitration
 14 agreement was unconscionable and necessitated reversal of the consolidation
 15 decision. *See* Pet., Ex. J, Ex. 5 at 4 (Sept. 27, 2023 Email from P. Huber to S.
 16 Nevins). STARZ opposed this argument on multiple grounds. *See* Pet., Ex. J, Ex.
 17 5 at 2–3 (September 27, 2023 Email from D. Horniak to S. Nevins). After hearing
 18 the parties’ arguments yet again, JAMS declined to reverse the consolidation
 19 decision. *See* Pet., Ex. J, Ex. 6 at 1 (Oct. 23, 2023 Letter from S. Eisner to
 20 Parties). JAMS deferred to the arbitrator the decision on the issue of arbitration
 21 location for an in-person hearing. *Id.*

22 Next, the parties proceeded to strike and rank arbitrators from a list JAMS
 23 provided, and JAMS appointed an arbitrator that neither party had struck. *See* Pet.,
 24 Ex. J, Ex. 7 at 1 (Notice of Appointment of Arbitrator Gail Andler). On November
 25 30, 2023, fifteen days after JAMS circulated the arbitrator’s disclosures, Keller
 26 served boilerplate notices of disqualification under California Civil Procedure
 27 Code section 1281.91(b)(1) for 7,213 of the 7,282 claimants remaining in the
 28 arbitration. *Id.*; *see also* Pet., Ex. E at 9 (JAMS Rule 15); Pet., Ex. J, Ex. 13

1 (January 8, 2024 Letter from S. Eisner to Parties).

2 Those notices did not explain what information in the disclosure statement
 3 supported disqualification, and Keller repeatedly refused to give the reason(s). *See*
 4 Pet., Ex. J, Ex. 8 at 2 (Nov. 30, 2023 Letter from W. Postman to S. Nevins); Pet.,
 5 Ex. J, Ex. 10 (Dec. 15, 2023 Letter from P. Huber to S. Nevins). Instead, Keller
 6 merely contended that the “[n]otices were timely served upon receipt of the
 7 required disclosure statement” and that claimants had the “unqualified” right to
 8 remove a proposed arbitrator. Pet., Ex. J, Ex. 10 at 1 (Dec. 15, 2023 Letter from P.
 9 Huber to S. Nevins). STARZ opposed the disqualification on the grounds that it
 10 was a pretext to fracture the consolidated arbitration and not actually based on any
 11 information in the arbitrator’s disclosure statement. STARZ also argued that, if
 12 JAMS concluded the disqualification was valid, then the arbitrator must be
 13 disqualified from the entire consolidated arbitration under JAMS Rule 15(f) (and
 14 not just as to those claimants who had served notices of disqualification). Pet.,
 15 Ex. J, Ex. 9 at 1–3 (Dec. 8, 2023 Letter from D. Horniak to S. Nevins).

16 On January 8, 2024, the NAC concluded that JAMS would honor the
 17 requests for disqualification by “appoint[ing] a replacement arbitrator pursuant to
 18 the parties’ previously submitted strikes and ranks.” Pet., Ex. J, Ex. 13 (January 8,
 19 2024 Letter from S. Eisner to Parties); *see also* Pet., ¶ 20. The NAC also agreed
 20 with STARZ that the arbitrator had been disqualified from the entire consolidated
 21 arbitration, not just part of it. Accordingly, JAMS did not split the arbitration into
 22 multiple proceedings as Keller had sought. *See* Pet., ¶¶ 17, 20. Instead, *all* 7,282
 23 claims would remain consolidated in a single arbitration before a new arbitrator.
 24 *See* Pet., ¶ 20; Ex. J, Ex. 13 (January 8, 2024 Letter from S. Eisner to Parties).

25 Two days later, Keller sent STARZ a letter demanding that STARZ
 26 “stipulate to resolve the instant disputes with Claimants through individual
 27 arbitrations, and not in a consolidated arbitration.” Pet., Ex. I at 1 (Letter from P.
 28 Huber to D. Horniak); *see also* Pet., ¶ 21. STARZ declined to stipulate and

1 reiterated its willingness to proceed immediately with the consolidated arbitration.
 2 Pet., Ex. J at 3 (January 17, 2024 Letter from D. Horniak to P. Huber and A. Pak);
 3 *see also* Pet., ¶ 22.

4 On January 31, 2024, Keller filed this Petition to Compel Arbitration.

5 **III. LEGAL STANDARD**

6 Under the Federal Arbitration Act (“FAA”), “[a] party aggrieved by the
 7 alleged failure, neglect or refusal of another to arbitrate under a written agreement
 8 for arbitration” may “petition any United States district court . . . for an order
 9 directing that such arbitration proceed in the manner provided for in such
 10 agreement.” 9 U.S.C. § 4.

11 Although styled as a “petition,” the pleading is still subject to the Federal
 12 Rules of Civil Procedure, including motions to dismiss under Rule 12(b)(6). *See*,
 13 *e.g.*, *Pac. Media Workers Guild v. San Francisco Chronicle*, 2017 WL 1861853,
 14 at *2 (N.D. Cal. May. 9, 2017) (resolving Rule 12(b)(6) motion to dismiss petition
 15 to compel arbitration); *Service Employees Int'l Union, Local 1877 v. Citiscape
 16 Prop. Mgmt. Group LLC*, 2009 WL 1086963, at *1 (N.D. Cal. Apr. 20, 2009)
 17 (same). Under Rule 12(b)(6), the Court must dismiss the petition if it fails to state
 18 a claim upon which relief can be granted—that is, if there is no basis to compel
 19 the arbitration that the petition seeks. *See* Fed. R. Civ. P. 12(b)(6).

20 **IV. ARGUMENT**

21 **A. The FAA Does Not Provide a Basis to Overrule JAMS’s Decisions**

22 **1. STARZ Has Not Refused to Arbitrate**

23 To invoke Section 4 of the FAA, Petitioner must demonstrate she has been
 24 “aggrieved” by STARZ’s “failure, neglect, or refusal [] to arbitrate under a written
 25 agreement for arbitration.” *See* 9 U.S.C. § 4; *Cnty. State Bank v. Strong*, 651 F.3d
 26 1241, 1256 (11th Cir. 2011) (“After all, FAA § 4 is only triggered when one party
 27 has expressed a ‘refusal’[, failure, or neglect] to arbitrate, and the other party has
 28 been thereby ‘aggrieved.’”) (alterations in original).

1 STARZ has not refused to arbitrate Petitioner’s claims. To the contrary,
 2 Petitioner admits that she and STARZ are currently arbitrating her claims. *See*
 3 Pet., ¶ 11 (“JAMS commenced arbitration proceedings as to roughly 7,300
 4 pending arbitration demands, *including Petitioner’s.*”) (emphasis added). On July
 5 6, 2023, JAMS commenced the 7,300 arbitrations Keller initiated against STARZ.
 6 *See* Pet., Ex. F, Ex. 7 at 1 (July 6, 2023 Letter from K. Loew to Parties). After
 7 thorough consideration of the parties’ arguments, JAMS determined Petitioner’s
 8 claim should proceed in a consolidated arbitration, *see* Pet., ¶ 14, and thereafter
 9 appointed Judge Gail Andler to preside over the consolidated arbitration. *Id.* at
 10 ¶ 15. While Keller served disqualification notices for Judge Andler on behalf of
 11 7,214 claimants, STARZ did not. *See id.* at ¶ 18. Indeed, the Petition lacks any
 12 allegation that STARZ has tried to subvert JAMS’s administration of Petitioner’s
 13 arbitration in any way. Nor could it, because STARZ has fully participated in the
 14 pending arbitration proceeding.

15 Petitioner therefore fails to meet Section 4’s most basic requirement that the
 16 Respondent has “fail[ed], neglect[ed], or refus[ed]” to arbitrate her dispute. *See* 9
 17 U.S.C. § 4. Her Petition should be dismissed on this basis alone.

18 **2. The Arbitration Agreement Delegates these Issues to JAMS**

19 The Petition should also be dismissed because the STARZ TOU delegate to
 20 JAMS the instant decisions on consolidation, arbitrator selection, and
 21 interpretation of the JAMS Rules—and Petitioner now seeks to have the Court
 22 improperly intervene and overrule JAMS’s decisions on those issues. *See* Pet.,
 23 ¶¶ 11, 14; Ex. F, Ex. 7 at 1 (July 6, 2023 Letter from K. Loew to Parties).

24 As an initial matter, courts routinely enforce contractual agreements to
 25 delegate. *See, e.g., Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015)
 26 (holding that incorporation of the AAA rules was clear and unmistakable evidence
 27 that parties delegated to arbitrator issues of arbitration clause validity and
 28 arbitrability); *Oracle Am., Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1074 (9th

1 Cir. 2013) (“Virtually every circuit to have considered the issue has determined
 2 that incorporation of the American Arbitration Association’s (AAA) arbitration
 3 rules constitutes clear and unmistakable evidence that the parties agreed to
 4 arbitrate arbitrability.”). Importantly, courts also do not review an arbitration
 5 provider’s interpretation of its own rules. *See Vital Pharms. Inc. v. PepsiCo Inc.*,
 6 2022 WL 2176528, at *3 n.3 (D. Ariz. June 16, 2022) (“The Court has no warrant
 7 to disturb the AAA’s interpretation of its own rules”); *Steffanie A. v. Gold Club*
 8 *Tampa, Inc.*, 2020 WL 4201948 (M.D. Fla. July 22, 2020) (declining to order the
 9 AAA to reopen an arbitration it previously closed under its AAA’s Rules); *Cota v.*
 10 *Art Brand Studios, LLC*, 2021 WL 4864588 (S.D.N.Y. Oct. 15, 2021) (quoting
 11 *Steffanie A.* for the proposition that a “district court can[not] force an independent
 12 arbitration organization such as the AAA to ignore its own rules and re-open a
 13 case that it has previously closed”).

14 Here, the STARZ TOU expressly provides that “[a]ll controversies,
 15 disputes or claims arising out of or relating to these Terms of Use will be
 16 determined pursuant to the mediation and arbitration procedures of JAMS, *and*
 17 *administered by JAMS or its successor (“JAMS”) in accordance with the*
 18 *comprehensive rules and procedures.*” Pet. Ex. A at ¶ 27 (STARZ TOU)
 19 (emphases added). All JAMS did here was “administer” the arbitrations Keller
 20 initiated “in accordance with the comprehensive rules and procedures”:

- 21 • Consolidation. Under JAMS Rule 6(e), JAMS has the authority to
 22 consolidate arbitrations. *See* Pet., Ex. E, JAMS Rules, at 7 (“Unless
 23 the Parties’ Agreement or applicable law provides otherwise, JAMS, if
 24 it determines that the Arbitrations so filed have common issues of fact
 25 or law, may consolidate Arbitrations”). Rule 6(e) expressly
 26 delegates this determination to “JAMS”—*i.e.*, not to the arbitrator—
 27 and JAMS Rule 1(c), in turn, provides that “[t]he authority and duties
 28 of JAMS as prescribed in the Agreement of the Parties and in these
 Rules shall be carried out by the JAMS National Arbitration

Committee (“NAC”)” Pet., Ex. E at 4. Here, the NAC simply determined that under JAMS Rule 6(e), consolidation is appropriate because the arbitrations have “common issues of fact or law” and “the Parties’ Agreement or applicable law” does not prohibit consolidation.

- Single Party. Under JAMS Rule 15(f), JAMS may treat all parties whose interests are not adverse (i.e., all claimants in a consolidated proceeding) as one party for the purposes of arbitrator selection. *See Pet.*, Ex. E, JAMS Rules, at 10 (“Entities or individuals whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of the Arbitrator selection process.”). Further, JAMS determines whether parties are not adverse. *See id.* (“JAMS shall determine whether the interests between entities or individuals are adverse for purposes of Arbitrator selection, considering such factors as whether they are represented by the same attorney and whether they are presenting joint or separate positions at the Arbitration.”). Here, the NAC simply applied these rules to conclude that a notice of disqualification from any claimant disqualifies the arbitrator from the entire consolidated arbitration.
- Jurisdiction and Arbitrability. Under JAMS Rule 11(b), “[j]urisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought . . . shall be submitted to and ruled on by the Arbitrator.” *Pet.*, Ex. E, JAMS Rules, at 8. In June 2023, Keller cited JAMS Rule 11(b) to argue to JAMS that, “[u]nder the JAMS rules designated in the arbitration agreement, [the parties’ dispute over mediation fees] is for a JAMS arbitrator to resolve.” *Pet.*, Ex. F, Ex. 6 at 1 (June 14, 2023 Email from A. Pak to S. Nevins). JAMS agreed with Keller and initiated arbitration over STARZ’s objection. *See Pet.*, ¶ 11; Ex. F, Ex. 7 at 1 (July 6, 2023 Letter from K. Loew to Parties). Here, all JAMS did was accept Keller’s argument, concluding that the parties’ dispute over mediation fees is a matter of “interpretation . . . of the agreement under which Arbitration is

sought” that JAMS Rule 11(b) delegates to the arbitrator.

Thus, in consolidating Petitioner’s demand for arbitration with other Keller demands, concluding that notices of disqualification disqualified the arbitrator from the entire consolidated proceeding, and referring the dispute on mediation fees to the arbitrator (at Petitioner’s counsel’s request), JAMS simply administered the arbitration “in accordance with the [JAMS] comprehensive rules and procedures,” exactly as the STARZ TOU require. The FAA provides no basis to overrule those decisions.

3. Consolidation is a Procedural Question that Should Be Resolved in Arbitration

But even if the parties had not expressly delegated these issues to JAMS, the Petition would still need to be dismissed because it impermissibly asks the Court to decide procedural questions that courts have repeatedly held are presumptively for arbitrators, not courts, to decide. In deciding a petition to compel arbitration, “[o]nce it is determined . . . that the parties are obligated to submit the subject matter of the dispute to arbitration, ‘procedural’ questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.” *Meadows v. Dickey’s Barbecue Restaurants Inc.*, 2016 WL 7386138, at *2 (N.D. Cal. Dec. 21, 2016) (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964); *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (noting that procedural questions “are presumptively *not* for the judge, but for an arbitrator, to decide”) (emphasis in original) (citing *John Wiley*, 376 U.S. at 557–58).

For example, in *Meadows*, plaintiffs alleged in a motion to compel a consolidated arbitration that a franchisor made false and misleading statements. *See Meadows*, 2016 WL 7386138, at *1. The court “refuse[d] to entertain” the motion, holding that “consolidation is a procedural question for the arbitrator.” *Id.* at *2. The court reasoned that, like the availability of class arbitration, “California

1 courts have similarly held that consolidation is a procedural issue for the arbitrator
 2 to decide.” *Id.* at *3.³ The court further held that, “[t]o the extent that Plaintiffs
 3 believe that their claims should be consolidated, each Plaintiff . . . can request
 4 consolidation per the AAA’s rules.” *Meadows*, 2016 WL 7386138, at *3; *see also*
 5 *Cohen v. CBR Sys., Inc.*, 2023 WL 8602288, at *2 (N.D. Cal. Dec. 12, 2023)
 6 (consolidation “is a pure procedural question for the arbitrator to decide if and
 7 when it is properly raised in the arbitration.”).

8

9 **B. In the Alternative, the Court Should Deny Petitioner’s Requests
 for Relief**

10 For the reasons stated above, the Court can and should dismiss the Petition
 11 on procedural grounds. However, Petitioner’s arguments also fail on their merits.

12 **1. The STARZ TOU Permit Consolidation**

13 Petitioner is wrong that the STARZ TOU require individual, not
 14 consolidated, arbitrations. *See Pet.*, ¶ 23. The STARZ TOU do not even contain
 15 the words “individual arbitration.” *See Pet.*, Ex. A. Rather, as JAMS has
 16 repeatedly concluded, a plain reading of the STARZ TOU shows that the STARZ
 17 TOU only prohibit claimants from bringing claims *on behalf of others*—not
 18 consolidation of arbitration demands. *See Pet.*, Ex. A at ¶ 27 (STARZ TOU)
 19 (“[User] and [STARZ] agree that each may bring claims against the other only in
 20 [user’s] or its individual capacity, and not as a plaintiff or class member in any
 21 purported class or representative.”). In a consolidated arbitration, each individual

22

23 ³ *See also Employers Ins. Co. of Wausau v. Century Indemnity Co.*, 443
 24 F.3d 573, 577 (7th Cir. 2006) (“We find based on *Howsam* that the question of
 25 whether an arbitration agreement forbids consolidated arbitration is a procedural
 26 one, which the arbitrator should resolve.”); *Shaw’s Supermarkets, Inc. v. United*
Food and Commercial Workers Union, Local 791, 321 F.3d 251, 254 (1st Cir.
 27 2003) (“The issue before us is who should make the determination as to whether
 28 to consolidate the three grievances into a single arbitration: the arbitrator or a
 federal court. Since each [grievance] is itself concededly arbitrable, we think the
 answer is clear. Under [*Howsam*], this is a procedural matter for the arbitrator.”)

1 claimant still brings its “claims against [STARZ] only in [its] individual capacity”
2 and not on behalf of any other claimant. Thus, a claimant does not participate in a
3 “purported class or representative proceeding,” and nothing in the STARZ TOU
4 prohibits consolidation.⁴ To the contrary: the STARZ TOU expressly authorize
5 consolidation by stating that arbitrations will be conducted and administered
6 pursuant to the JAMS Rules—including JAMS Rule 6(e), which expressly
7 authorizes JAMS to consolidate arbitrations. *See* Pet., Ex. E, JAMS Rules, at 7.

2. California Law Expressly Permits Consolidated Arbitrations

10 The Petition offers the strawman argument that a party's right to disqualify
11 a proposed arbitrator under California Code of Civil Procedure section
12 1281.91(b)(1) somehow negates JAMS's ability to consolidate arbitrations. Pet.,
13 ¶ 44. This argument is incorrect.

14 First, by invoking the FAA in her Petition, Petitioner has conceded that the
15 FAA—and not the California Arbitration Act (which includes section
16 1281.91(b)(1))—applies here. Although the STARZ TOU provide that “[t]hese
17 Terms of Use will be governed by and construed in accordance with the laws of
18 the State of California,” Pet., Ex. A (STARZ TOU), ¶ 27, they also provide that
19 “[a]ll controversies, disputes or claims arising out of or relating to these Terms of
20 Use will be determined pursuant to the mediation and arbitration procedures of

22 ⁴ When parties want to prohibit consolidation, they say so expressly. There
23 are countless examples of arbitration clauses that expressly prohibit consolidation,
24 including several of other streaming services. *See, e.g.*, Terms of Use, Netflix,
25 <https://help.netflix.com/legal/termsofuse> (“[U]nless both you and Netflix agree
26 otherwise, the arbitrator may not *consolidate* more than one person’s claims with
27 your claims” (emphasis added)); Terms of Use, HBO, <https://www.hbo.com/terms-of-use> (“[U]nless both you and we agree otherwise, the arbitrator may not
28 *consolidate* more than one person’s claims” (emphasis added)). In contrast,
the word “*consolidate*” never appears in the STARZ TOU. If STARZ had
intended to prohibit consolidation, it would have said so. It did not.

1 JAMS, and administered by JAMS or its successor ('JAMS') in accordance with
 2 the comprehensive rules and procedures, including the optional appeal procedure,
 3 of JAMS ('JAMS Rules'), as modified by these Terms of Use." *Id.*

4 In such cases, "the FAA and JAMS Rules govern the rules of arbitration."
 5 *Golden v. O'Melveny & Meyers LLP*, 2016 WL 4168853, at *8–16 (C.D. Cal.
 6 Aug. 3, 2016) (holding a "choice-of-law clause, stating that it 'will be governed
 7 by the internal law . . . of the State of California,'" did not "trigger the blanket
 8 application of [California's] procedural law."); *see also Sovak v. Chugai Pharm.*
 9 *Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002), *op. amended on denial of reh'g*, 289
 10 F.3d 615 (9th Cir. 2002) ("[A] general choice-of-law clause within an arbitration
 11 provision does not trump the presumption that the FAA supplies the rules for
 12 arbitration."). Thus, Petitioner does not even have grounds to disqualify the
 13 arbitration under CAA section 1281.91(b)(1).

14 Second, even if the California Arbitration Act applied here, Petitioner's
 15 extraordinarily expansive interpretation of section 1281.91(b)(1) is wrong.
 16 Petitioner's interpretation conflicts with, and asks the Court to nullify entirely, a
 17 different provision of the same law—section 1281.3—in which the California
 18 Legislature expressly authorized consolidation of arbitrations. *See Cal. Civ. Proc.*
 19 Code § 1281.3. Section 1281.3 states:

20 A party to an arbitration agreement may petition the court
 21 to consolidate separate arbitration proceedings, and the
 22 court may order consolidation of separate arbitration
 23 proceedings when:

24 (1) Separate arbitration agreements or proceedings exist
 25 between the same parties; or one party is a party to a
 26 separate arbitration agreement or proceeding with a third
 27 party; and
 28 (2) The disputes arise from the same transactions or series
 of related transactions; and

(3) There is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

4 | Cal. Civ. Proc. Code § 1281.3.

5 Section 1281.3 reflects California’s “strong policy favoring consolidating
6 arbitrations involving common issues of law and fact.” *Gordon v. G.R.O.U.P.,*
7 *Inc.*, 49 Cal. App. 4th 998, 1006 (Cal. Ct. App. 1996) (quoting *Garden Grove*
8 *Cmty. Church v. Pittsburgh-Des Moines Steel Co.*, 140 Cal. App. 3d 251, 262
9 (Cal. Ct. App. 1983)). This is due to “at least three important aims of this policy:
10 the efficient settling of private disputes, judicial economy, and the avoidance of
11 contrary results.”” *Id.*

Under Petitioner’s reading of section 1281.91(b)(1), no arbitration governed by California law could ever be consolidated because it would interfere with each claimant’s right to disqualify the arbitrator independently from any other claimant. Tellingly, Petitioner cites no authority in support—and that is because none exists. Such an interpretation violates basic principles of statutory construction by rendering all of section 1281.3 surplusage. *See, e.g., Marx v. Gen. Rev. Corp.*, 568 U.S. 371, 386 (2013) (“[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.”). Keller’s interpretation also conflicts with California court decisions recognizing that consolidated arbitrations are permissible. *See, e.g., Indep. Ass’n of Mailbox Ctr. Owners, Inc. v. Superior Court*, 133 Cal. App. 4th 396, 410 (Cal. Ct. App. 2005) (“[G]roup arbitration can be a valid means of dispute resolution where the statutory and case law criteria for consolidation are satisfied.”).

25 In fact, there is no conflict between section 1281.91(b)(1) and
26 consolidation. Section 1281.91(b)(1) does not confer an unwaivable right “to
27 choose” an arbitrator. Rather, it confers a *waivable* right to *disqualify* an arbitrator.
28 *See* Cal. Civ. Proc. Code § 1281.91(b)(1)–(c) (discussing disqualification and

1 stating circumstances under which right can be waived). All parties, including
 2 STARZ, have that right. *See id.* Here, JAMS appointed Judge Andler pursuant to
 3 the STARZ TOU and JAMS Rules. *See Pet.*, ¶ 15. At that point, any party had the
 4 right to seek to disqualify that “proposed neutral arbitrator” on the basis of the
 5 proposed arbitrator’s disclosure statement within 15 days of receipt of the
 6 disclosure statement. Cal. Civ. Proc. Code § 1281.91(b)(1). In a consolidated
 7 arbitration, each party—including every claimant—*still* has that right. The fact
 8 that one claimant may disqualify an arbitrator that another claimant would prefer
 9 to keep is of no moment under section 1281.91(b)(1). Indeed, the effect would be
 10 no different than if STARZ disqualify the very same arbitrator, which it
 11 unquestionably has the right to do.

12 This conclusion is fully consistent with the decision in *Roussos v. Roussos*,
 13 60 Cal. App. 5th 962, 971 (Cal. Ct. App. 2021), which Keller cites in its Petition.
 14 *See Pet.*, ¶ 47 (citing *Roussos* for the proposition that “Petitioner has the absolute
 15 right to disqualify a proposed arbitrator without cause.”). In *Roussos*, the issue
 16 was whether the parties could “contract away” or limit the right to disqualify an
 17 arbitrator under section 1281.91(b)(1). *See id.* at 967 (“[W]e conclude the parties
 18 cannot contract away California’s statutory protections for parties to an
 19 arbitration, including mandatory disqualification of a proposed arbitrator”).
 20 Here, by contrast, there is no argument that any party has “contract[ed] away” or
 21 otherwise limited its right to disqualify an arbitrator. Every party has very same
 22 rights in a consolidated arbitration. But Petitioner’s failure to disqualify Judge
 23 Andler does not mean she had the right “to choose her arbitrator.” *Pet.*, ¶ 48.

24 **3. Petitioner Should Be Judicially Estopped from Seeking the
 25 Court’s Ruling on Mediation Fees**

26 Keller’s request that this Court rule on the issue of mediation fees should be
 27 rejected under the doctrine of judicial estoppel. Under the doctrine, a party is
 28 precluded “from gaining an advantage by taking one position, and then seeking a

1 second advantage by taking an incompatible position.” *AP-Colton LLC v. Ohaeri*,
 2 240 Cal. App. 4th 500, 507 (Cal. Ct. App. 2015). The doctrine applies to positions
 3 taken “in judicial or quasi-judicial administrative proceedings” such as arbitration.
 4 *Id.* at 507; *see also Massey v. Knowles*, 2006 U.S. Dist. LEXIS 102029, at *7 (D.
 5 Or. July 19, 2006) (“This court finds that judicial estoppel should preclude
 6 [Petitioners] from taking inconsistent positions in the arbitration and in this
 7 proceeding.”).

8 Here, Keller (on behalf of Petitioner and other claimants) demanded in June
 9 2023 that JAMS initiate arbitration on the issue of how mediation fees should be
 10 split. *See Pet.*, ¶ 10; Ex. F, Ex. 6 at 1 (June 14, 2023 Email from A. Pak to S.
 11 Nevins) (“Claimants will not participate in any mediation that requires them to
 12 pay half of the mediation fees and instead invoke their rights to arbitrate that
 13 dispute.”). Keller took the position that, “[u]nder the JAMS rules designated in the
 14 arbitration agreement, [the mediation fee] dispute is for a JAMS arbitrator to
 15 resolve.” *Id.* On July 6, 2023, JAMS agreed with Keller, granted Keller’s request
 16 over STARZ’s objection, and initiated arbitration. *See Pet.*, ¶ 11; Ex. F, Ex. 7 at 1
 17 (July 6, 2023 Letter from K. Loew to Parties).

18 Despite successfully demanding an arbitration on the issue of mediation
 19 fees, Petitioner has made an about-face and asks *now* for federal-court resolution
 20 of the mediation fees issue. *See Pet.*, p. 14 (“Petitioner respectfully requests that
 21 this Court enter an Order: . . . declaring that, to the extent the JAMS Arbitration
 22 Agreement requires Petitioner to pay mediation fees in excess of \$250, that aspect
 23 of the Agreement is unconscionable, unenforceable, and severed[.]”). The
 24 Petition’s demand squarely meets the criteria of judicial estoppel. Keller and
 25 Petitioner previously took the position with JAMS that an *arbitrator* must resolve
 26 the mediation-fees dispute and won. Months later and unhappy with how the
 27 arbitration is proceeding, Petitioner now argues that a *federal court* (and *not* an
 28 arbitrator) must decide the very same issue. Keller and Petitioner have two

1 positions—each incompatible and inconsistent with the other—in judicial or
2 quasi-judicial proceedings and were “successful in asserting the first position” that
3 was “not taken as a result of ignorance, fraud, or mistake.” *AP-Colton*, 240 Cal.
4 App. 4th at 507. The Court should apply the doctrine of judicial estoppel and deny
5 Petitioner the relief sought.

6 **V. CONCLUSION**

7 For the foregoing reasons, STARZ respectfully requests that the Court
8 dismiss the Petition with prejudice.

9 Dated: February 13, 2024

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Local Rule 11-6 Verification

The undersigned, counsel of record for Respondent STARZ Entertainment LLC, certifies that this brief contains 6,348 words, which complies with the word limit of L.R. 11-6.1.

Dated: February 13, 2024

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